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No. 80-1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEAMSTERS LOCAL UNION NO. 115,
a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY MEMORANDUM

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1. The Board properly concedes that the District of Columbia Circuit ignored Member Penello's conclusion that the Board lacked statutory authority to impose a remedial non-majority bargaining order. As the Board acknowledges, the circuit court decision is based upon its assumption that Member Penello "*would have* declined to issue a bargaining order in this case if it were determined that the Board in fact had such authority." (Br., p. 6) (emphasis supplied). But, as this Court has recently reiterated, an appellate court may not enforce a Board order by adopting "an

analysis different from that espoused by the Board." *First National Maintenance Corp. v. NLRB*, ____ U.S. ____, n. 6 (1981). The District of Columbia Circuit cannot speculate concerning Member Penello's application of new law to the individual facts of this case.

2. The Company concedes that "the Board's discretionary power to fashion remedies encompasses a minority-based bargaining order." (Br., pp. 5 - 6). It argues, however, that the facts presented do not warrant such relief, a position not asserted by either the court of appeals or the Board. Member Penello, whose vote was decisive, did not believe the facts were even relevant, and the court of appeals did not analyze the facts in this context. Had the Board found the requested relief inappropriate on the facts presented, the court might have deferred to the Board's exercise of discretion. But Member Penello did not exercise his discretion and neither did the Board. The court of appeals, therefore, could not uphold the Board's exercise of discretion.

CONCLUSION

For the reasons stated above and in our main brief, we respectfully urge the Court to grant a Writ of Certiorari in this case.

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